SUPREME COURT U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1266

MICHAEL J. McLANEY, a/k/a
MIKE McLANEY,

Petitioner,

vs.

TIME, INC., d/b/a "LIFE",

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPINION BELOW

Petitioner seeks a writ of certiorari to the United States Court of Appeals for the Fifth Circuit which on January 3, 1969, granted summary judgment to respondent. The action is in libel based upon an article published in Life Magazine. The opinion below is reported at 406 F. 2d 565. It contains a complete and detailed statement of the relevant facts of this case and the basis for granting of summary judgment. Initially, this Court can read that opinion and, as it did in *United Medical Laboratories, Inc.* v. *Columbia Broadcasting System, Inc.*, 404 F. 2d 706 (9th Cir. 1968), *cert. denied,* U. S. (March 24, 1969) and *Washington Post Co.* v. *Keogh,* 365 F. 2d 965 (D. C. Cir. 1966), *cert. denied,* 385 U. S. 1011, and upon the same grounds, deny certiorari.

QUESTIONS PRESENTED

Three questions have been presented concerning recent First Amendment cases dealing with constitutional protection in connection with defamation. First, when does the mantle of constitutional protection fall? Secondly, if it does offer protection, precisely what is that protection? Thirdly, by what means can the publisher avail himself of that protection?

STATEMENT

McLaney, a professional gambler who operated the Casino Nacional in Havana at a time when the notorious Meyer Lansky in cooperation with Batista controlled gambling there and, thereafter, gambling casinos at Cat Cay in the Bahamas and the Carrousel in Las Vegas, objects to a comment concerning him written in connection with his contribution of $60,000 towards election of Lynden Pindling as Premier of the Bahamas at a time when gambling in the Bahamas was the prime election issue. Basis for Life's statement is set forth *in extenso* in the opinion of the Fifth Circuit below and need not be repeated here. Suffice it to say that respondent's employees, file and sources were examined in detail and revealed conclusively that the statement concerning petitioner in respondent's magazine Life was made in good faith and upon a firm basis concerning a matter of public interest.

ARGUMENT

(a) The Constitution bars this petition.

If this petition had been filed five years ago there would have been ample justification for this Court to grant the petition and review the case. We submit, however, that all three questions have now been substantially determined, certainly determined in so far as they apply to this action.

There therefore is nothing to review today as this Court's decisions* have so clearly established.

It should now be apparent that constitutional protection is granted in defamation to discussion of matters of public interest. That was the explicit *basis* for this Court's holdings, when dealing with defamation, in *New York Times* (p. 269), *Garrison* (pp. 74-75), *Rosenblatt* (p. 86), and *Butts* (pp. 150-52). It was the *holding* of this Court in *Hill* (pp. 387-88) dealing with privacy and in which the question of the public interest test to defamation, as a direct holding, was reserved (p. 397). The Ninth Circuit in *United Medical* explicitly took the step reserved by this Court in *Hill* and made public interest the test for defamation. This Court denied certiorari in that case (U. S. March 24, 1969). The Fifth Circuit in this action explicitly adopted the rationale of *United Medical* (p. 573).

Moreover, the nature of the constitutional protection has now been thoroughly explored. This Court made quite clear that the test was actual knowledge of falsity or recklessness in *New York Times*. It went on further to define recklessness in *Garrison*, "high degree of awareness of probable falsity" (p. 74) and in *St. Amant*, "serious doubts as to truth" (p. 731). That avenue is now concluded.

Lastly, this Court has made it quite clear that summary judgment, rather than trial on the merits, is the proper vehicle for affording constitutional protection in the proper case. It had noted in *New York Times* (p. 279) and *Hill* (p. 389) that fear of the expense of trial was a valid one.

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*Those cases include doctrines announced in, among others: *Grosjean* v. *American Press Co.*, 297 U. S. 233; *Thornhill* v. *Alabama*, 310 U. S. 88; *Smith* v. *California*, 361 U. S. 147; *N.A.A.C.P.* v. *Button*, 371 U. S. 415; *New York Times Co.* v. *Sullivan*, 376 U. S. 254; *Garrison* v. *Louisiana*, 379 U. S. 64; *Henry* v. *Collins*, 380 U. S. 356; *Dombrowski* v. *Pfister*, 380 U. S. 479; *Linn* v. *Plant Guard Workers*, 383 U. S. 53; *Rosenblatt* v. *Baer*, 383 U. S. 75; *Time, Inc.* v. *Hill*, 385 U. S. 374; *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130; *Beckley Newspapers Corp.* v. *Hanks*, 389 U. S. 81; *St. Amant* v. *Thompson*, 390 U. S. 727.

Thereafter, in *Keogh* and *United Medical,* this Court denied certiorari and thus upheld the granting of motions for summary judgment in First Amendment cases. That, it seems to us, should end the matter.

This case qualifies on all three counts. (1) It has public interest in an article dealing with the activities of the gambling mob who financed their activities in the United States by operation of gambling in the Bahamas, as well as dealing with an election in the Bahamas in which petitioner McLaney actively participated. Certainly, there is deep public interest in both (compare the public interest in Castro of Cuba in the latter regard). (2) The lack of "knowledge of falsity" or "serious doubts as to truth" has been so conclusively demonstrated that the point is not even raised in the petition for certiorari. (3) Finally, the full disclosure of respondent's activities and sources, sufficient for the granting of summary judgment, has been demonstrated to the Court, as conclusively shown by the detailed statement of fact contained in the Fifth Circuit's opinion below.

The course of *New York Times* has run and, absent some unusual case or refusal of lower courts to follow these new concepts, there should be nothing more for this Court to review. If we are wrong in that conclusion, based upon the reasons we have stated, we would welcome review in order to ensure that we are correct in our statement of those principles.

(b) Public interest.

We need not deal with the question of "actual malice" since lack of that element in his case has been conceded by petitioner's failure to deal with it in his petition. We need deal no further with the perquisites of a motion for summary judgment based thereon, since the Fifth Circuit's opinion has dealt with that subject extensively and conclusively. There remains the subject of "public interest" as to which a short additional statement may be helpful to the Court.

McLaney was admittedly involved in the Bahamas election. According to his own admission he participated in the Pindling election campaign. Additionally, he was involved in Havana gambling when it was widely known to have been controlled by American organized crime and there was a direct connection between the former Havana gambling fraternity and the kingpins of the gambling structure in the Bahamas. McLaney's connection with doings in the Bahamas was of immediate public importance. Thus it was both in context and timely to point out in the Life article that a colleague of "Courtney, Ritter and Brudner" had turned up in the political campaign of the anti-mob candidate. The article dealt with precisely that matter of public interest, not with petitioner's private life, and in that context petitioner, not Life, made his activities a matter of legitimate public interest.

There was sufficient public interest so that, following the Life article, a Royal Commission of Inquiry was appointed in the Bahamas. At hearings held in the spring of 1967, the Commission was especially interested in petitioner's background and in his scheme to take over Bahamian gambling. Petitioner testified before the Commission. In its Report, the Commission of Inquiry confirmed that American organized crime had infiltrated gambling in the Bahamas. The Commission devoted a separate section of its Report to petitioner's attempt to take over gambling under Pindling, and concluded:

> ". . . On the evidence of his past activities, which we heard in detail from the Commissioner of Police, we formed the opinion that Mr. McLaney was an unscrupulous individual. . . . We regard Mr. McLaney as a thoroughly dangerous person who is likely to do nothing but harm to the Bahamas." COMMISSION OF INQUIRY INTO THE OPERATION OF THE BUSINESS OF CASINOS IN FREEPORT AND IN NASSAU, REPORT 94-95 (1967).

Petitioner's argument that he is not a public figure is, in reality, grounded upon his conclusion that he has not been publicly identified as a colleague of Courtney, Ritter and Brudner before, and therefore is not a public figure in that context. This argument assumes that there must be at least one prior public identification of the individual in the specific context of the discussion of the matter of public interest before the constitutional protections will be available as to statements made concerning that individual. In other words, there is no constitutional protection for a first publication; the first publisher must publish at the risk of being able later to prove his statements by court room evidence. This type of fallacious argument proposes a rule of law which would be just as inhibitory on free speech as the pre-*New York Times* decisions. Certainly the asserted lack of prior public identification is not relevant. Some types of individuals, such as leaders in organized crime shun publicity, yet this vocational quirk cannot enable them to avoid the extra protection afforded to the press for reports on the important subject of organized crime where these individuals have a legitimate connection and are mentioned. Constitutional protections cannot be destroyed by such self-serving behavior.

Our legal conclusion, then, is the principle that constitutional protection is given to discussion of matters of public interest and a person connected with such a matter (whether or not he received prior publicity) is a "public figure" for purposes of that constitutional protection. Conversely, a person who has received prior publicity and thus become a "public figure" is himself a matter of public concern justifying constitutional protection to discussion concerning him.*

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*Petitioner qualifies on either theory as is evidenced by the extensive publicity concerning, among other things, his operation of the Casino Nacional, as pointed out in the opinion below, 406 F. 2d at p. 569.

The issue here is not whether the statements about petitioner are true. Respondent believes that they are true and, if necessary, it can prove that they are true. The issue is whether, consistently with the freedom of press guaranteed by the First and Fourteenth Amendments, petitioner by bringing this action can force respondent to spend hundreds of thousands of dollars to prove at a trial that the statements are true when the record on the motion for summary judgment shows that he cannot establish that respondent published the statements with "actual malice". If the publishing industry faces this prospect every time it prints an article on organized crime, then the mob has found an easy way to silence the press.

CONCLUSION

The petition does not present any questions warranting review by the Court and should be denied.

May 8, 1969

Respectfully submitted,

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